could not, *ex hypothesi*, claim for breach of fiduciary duty, and so will not usually have any basis to seek a disgorgement of profit.

AARON TAYLOR

Address for Correspondence: Fountain Court Chambers, Temple, London, EC4Y 9DH, UK. Email: alt@fountaincourt.co.uk

JURISDICTION IN MULTI-FACTOR CLAIMS

THE two judgments of the Court of Appeal in *Manek v IIHL Wealth (UK) Ltd. and others* [2021] EWCA Civ 264 and 625 provide good examples of the complexities in determining whether the English High Court has and should exercise jurisdiction to decide a case with multiple connecting factors to many countries. The Indian claimants wished to bring an action in deceit against the defendants before the English Commercial Court. They alleged they had been cheated by the defendants out of the true value of their minority shareholding in an Indian company, Hermes. The majority shareholder was another Indian company controlled by two Indian residents, Ramu and Palani, the second and third defendants in this action. Jurisdiction against them was the only subject of the appeal. The claimants alleged that Ramu and Palani had persuaded the claimants' representatives to sell their minority holding in Hermes valued at $40 million to the majority shareholder. Hermes was then in fact swiftly sold to Wirecard, a German company, for 250 million Euros.

Ramu and Palani as natural persons could only be served with a claim form if they were physically present here. The court can give permission to serve defendants out of the jurisdiction under CPR 6.36 and Practice Direction 6B. The claimants must show: (1) that there was a serious issue to be tried against Ramu and Palani; (2) that there was a "gateway" available to found jurisdiction; and (3) that England was the proper place for trial (the *forum conveniens*). (1) was not in issue. The first judgment dealt with (2) and the second with (3). The additional argument, that the claim could not be decided in a court but must be dealt with by arbitration, was rejected by the Court of Appeal's second decision. This claim in deceit did not fall within the terms of the agreement and was made against persons who were not party to the agreement.

The claimants relied on the second paragraph of the tort "gateway". They bore the onus of proving that (1) there was a tort and (2) the damage sustained resulted from "substantial and efficacious acts" committed in England *(Metall und Rohstoff v Donaldson* [1990] 1 Q.B. 391). The defendants conceded, only for the purposes of jurisdiction, that there may have been a tort. The case therefore turned on whether the acts were substantial and whether England was the *forum conveniens.* Jurisdiction is determined

at an early, interim stage of proceedings. The facts are not proven until trial. Therefore the court has to decide on the basis of the parties' allegations. The standard of proof for jurisdictional matters is that of the "good arguable case". After some recent cases, that standard has been articulated as "a plausible evidential basis that [the claimant] has the better argument" (*Kaefer v AMS Drilling* [2019] EWCA Civ 10 [73]). Those apparently clear words hide the complexities of the task before the court.

In *Manek*, the defendants did not dispute what was said at various meetings; the dispute centred on whether the claimants could demonstrate a better argument that the acts committed within the territorial jurisdiction of the English court were substantial and efficacious. Coulson L.J. disagreed with the first-instance judge. As the oral evidence was not in dispute he could decide facts afresh without awkwardness that he had not heard witnesses examined and cross-examined. Defendants in future cases would be well-advised to consider whether it is wise to concede the veracity of allegations at the jurisdictional stage

Coulson L.J. evaluated the relevance of the various events which together made up this claim to determine if there were sufficient substantial and efficacious events to justify the exercise of jurisdiction. For the sale of their interest in Hermes, the claimants acted through two representatives, Hasu and Jayesh, who were resident in England. An initial meeting was held in India but neither Hasu nor Jayesh was present there. The next meeting was held in London for five hours face-to-face between Ramu, Palani, Hasu and Jayesh at which the claimants alleged false representations were made as to the sale of Hermes. A further meeting between Ramu and Hasu took place in London the following day. There were other events which together made up the alleged tort of deceit. These included meetings, emails and phone calls with connections to India, London, Vienna and Singapore. An English company and its director were brought in to vouch for the sale (these became the First and Fourth defendants). The final email agreeing to sell Hermes came from the claimants in India. An agreement selling the claimants' shares in Hermes was executed in Abu Dhabi before a later version was finally signed when Ramu flew to London for a few hours. That agreement contained an Indian arbitration clause. Hermes was sold to Wirecard in a transaction negotiated in London.

Coulson L.J.'s decision on the gateway turned on four conclusions. First, the acts in question must be the acts of the putative defendant. It is the defendant's acts which justify the exercise of jurisdiction. That made the Wirecard transaction irrelevant to jurisdiction. Second, the damage must have resulted from those acts. Third, this was an "evolving fraud". The claimants had continuing suspicions which were countered by Ramu and Palani at different times. Therefore, the last misrepresentation was not conclusive. Fourth, although the significance of the events has to be evaluated in the context of the fraud as a whole, a substantial event is not trumped by

other substantial events elsewhere. Coulson L.J. said "it is not permissible to embark on a geographical comparison exercise . . . announcing a single winner of the jurisdictional contest". All a claimant has to do to pass through the gateway is identify *some* plausible act of the defendant committed within the jurisdiction which substantially contributed to the tort. Coulson L.J. appeared more persuaded by the in-person meetings than decisions made by email or telephone. In modern international business practice, the connecting factor of an email sent from the airport in Dubai must be both fortuitous and unpredictable so therefore insignificant.

The decision could lead to a wide exercise of jurisdiction to the defendant's detriment. Rather than any focus on the gateway, the control lies in identifying England as the *forum conveniens*. The claimant must show that England is the "single jurisdiction in which the claims against all the defendants may most suitably be tried" (*Vedanta Resources v Lungowe* [2019] UKSC 20, at [68]). Suitability is to be determined by evaluating and weighing numerous factors connected to the possible venues: the location of the events, where the factual and expert evidence is found, the location of witnesses, the places where the parties carry on business or reside, the applicable law of the disputes, along with avoiding fragmentation of disputes, and agreements as to venue. Coulson L.J. concluded that England was the *forum conveniens*. He agreed with Lord Mance in *VTB Capital Plc v Nutritek* [2013] UKSC 5 that the place of commission of the tort was very relevant, if not presumptively the most suitable forum. Having previously decided that the claim satisfied one part of the tort gateway, he dismissed or ignored the alternative connecting factors. That pulled the *forum conveniens* result up by the gateway bootstrap. In particular, the connecting factors to the damage suffered by the claimants were overlooked. There is no reason of principle why the defendants' actions are more significant than the claimants' losses in deciding the suitable place for trial. The conclusion was further buttressed by the factors connecting two of the defendants to England. They were domiciled in England and therefore had to be sued here under the Brussels I Regulation in force at the time. The claimant had probably cleverly identified those defendants exactly to tilt the balance. Coulson L.J. paid no more than lip-service to the argument that giving too much weight to the advantage of deciding all disputes in one forum unwarrantedly favours England.

The *forum conveniens* doctrine can be criticised. It is unpredictable and can be easily manipulated by a claimant to force a defendant to the English court. The significance of the expectations of these defendants was overlooked in *Manek*. Could they, not within the territorial power of the English court, have expected to be sued in England? Were there sufficient connecting factors to justify the exercise of jurisdiction? Coulson L.J. considered relevant only the meetings of the parties in England, and the domiciles of various of the other parties to the litigation. None of the usual

weighing of the full range of factors happened. There is something valuable in Gloster L.J.'s urging judges to "ask the practical question where the fundamental focus of the litigation was to be found" (*Erste Group Bank A.G. v JSC* [2015] EWCA Civ 379), despite Coulson L.J. dismissing the idea as too loose. This was a dispute about a sale of an Indian company, largely owned by Indians, and in which the financial damage was suffered in India. The agreement of sale – albeit not binding on the particular defendants to this appeal – clearly indicated that some of the parties to the sale agreement expected dispute resolution in India. These procedural rules are now applicable to all cases commenced after 31st December 2020, even against EU-domiciled defendants. That the case ended up in England is much to the benefit of English lawyers but does little to control forum-shopping here.

Pippa Rogerson

Address for Correspondence: Gonville & Caius College, Trinity Street, Cambridge, CB2 1TA, UK. Email: pjr1000@cam.ac.uk